

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

To be argued by:
George H. Lowe
Syracuse, N.Y.
Estimated Time: 5 minutes

Docket
No. 75-6033

IN THE
United States Court of Appeals
For the Second Circuit

RICHARD LAMBERTSON,

Plaintiff-Appellant.

—vs—

UNITED STATES OF AMERICA,

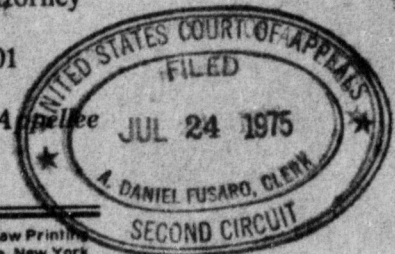
Defendant-Appellee.

On Appeal from the United States District Court
Northern District of New York

BRIEF FOR DEFENDANT-APPELLEE,
United States of America

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STATEMENT OF ISSUES

1. Does the Appellant's claim arise out of a battery,
thereby barring suit against the Appellee under the Federal
Torts Claim Act?

STATEMENT OF THE CASE

Appellant brought suit against the Government, seeking judgment in the amount of \$14,000 for damages allegedly resulting to him because of the acts of the Government's employee, William Boslet. (A 1-2).^{1.} By notice of motion dated December 11, 1974, the Government moved to dismiss the complaint on the grounds of lack of jurisdiction over the subject matter and failure to state a claim upon which relief could be granted. (A 14) .

Following oral argument on January 13, 1975, and February 10, 1975, United States District Judge Edmund Port, treating the Government's motion as one for summary judgment, granted the said motion, and directed that judgment be entered dismissing the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. (A 32-33; appellant's Brief, at 1).

STATEMENT OF FACTS

According to the complaint, the appellant on or about August 30, 1972, was employed by Armour & Co. unloading beef on the Company's receiving dock at its Syracuse, New York, plant. William Boslet was on duty at the plant on this occasion as a meat inspector for the United States Department of Agriculture.

^{1.} The pages referred to are those of the Appellant's "Transcript of Record."

The complaint alleges that Boslet "without any provocation or justification whatsoever . . . pulled a navy blue wool stocking cap over the plaintiff's eyes and ears and pushed the plaintiff into meat hooks. . . ." (A 1-2). The affidavits of purported witnesses to this incident, submitted in opposition to the Government's motion in the Court below, all contain the following statement: " . . . William Boslet jumped at [appellant] Richard Lambertson, saying "boo", and then pulled Richard Lambertson's woolen cap over his eyes and ears, and climbing on his back riding him piggy-back style, and negligently and carelessly pushing the said Richard Lambertson into some meat hooks, injuring Richard's teeth and face." (A 9, 10, 12). These meat hooks were "5 to 6 inches away" from appellant when Boslet allegedly committed the foregoing acts. (A 4).

POINT I

SUIT AGAINST THE UNITED
STATES ARISING OUT OF AN
ALLEGED BATTERY IS BARRED.

In Gardner v. United States, 446 F.2d 1195, 1197
(2nd Cir., 1971), this Court stated:

. . . it is dispositive that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define that

court's jurisdiction to entertain the suit." . . . A federal court has no jurisdiction of a suit against the federal government unless its consent to be sued is affirmatively established by statute.

Pursuant to the Federal Torts Claim Act, Title 28, United States Code, Sections 2671, et seq., and Title 28, United States Code, Section 1346(b), the Government has waived, on certain specific terms, its traditional immunity to suit. Section 2680 of Title 28, however, provides exceptions and limitations to this waiver. In particular, Section 2680 provides, in part:

The provisions of this chapter and section 1346(b) . . . shall not apply to -

. . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

POINT II

THE FACTS AS ALLEGED IN THE COMPLAINT CONSTITUTE A BATTERY

An action for battery is defined in Prosser, Law of Torts, Ch. 2, §9, at page 30, as follows:

One is liable to another for unpermitted, unprivileged contacts with his person, caused by acts intended to result in such contacts, or the apprehension of them, directed at the other or a third person.

At page 32 Dean Prosser further states:

The gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff. The defendant may be liable where he intended only a joke. . . .

Prosser's definition of "battery" was relied upon by this Court in Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir., 1973):

. . . the common law tort action for battery, which makes actionable any intentional and unpermitted contact with the plaintiff's person. . . .

See also 6 C.J.S., Assault and Battery, §1; 6 Am. Jur. 2d, Assault and Battery, §5; Restatement, Second, Torts, §13; Jayson, Personal Injury, Handling Federal Tort Claims, Vol. 2, §260.02.

It appears to be beyond dispute, based upon the complaint and the aforementioned affidavits, that Boslet intended to touch or come in contact with the appellant, i.e., to pull his cap down over his head and to jump on his back, and that appellant did not consent to this action, i.e., the complaint alleges that Boslet acted "without any provocation or justification whatsoever." The fact that appellant's face then came in contact with meat hooks that were five or six inches away clearly was a direct consequence of Boslet's touching or coming in contact with appellant. It follows, therefore, that the appellant's claim arises out of a battery.²

². Assuming arguendo the accuracy of the statement in Lane v. United States, 225 F. Supp. 850, 851 (E.D. Va., 1964), cited at page 5 of Appellant's Brief, that "Congress wished to avoid exposure to claims grounded upon the impulsive and 'hot headed' actions of employees," Boslet's actions would appear to be precisely what Congress had in mind.

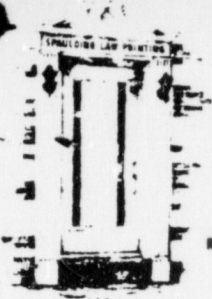
CONCLUSION

The Judgment of the Court below should be affirmed.

Respectfully submitted,

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RE: RICHARD LAMBERTSON v. UNITED STATES OF AMERICA

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of JAMES M. SULLIVAN, JR., United States Attorney, Northern District of New York, Attorney for Defendant-Appellee, ^{two (2)} he personally served ~~three (3)~~ copies of the printed ~~[Resub]~~ [Brief] ~~[Appendix]~~ of the above-entitled case addressed to:

ANTHONY F. ENDIEVERRI, ESQ.
Attorney at Law
5104 W. Genesee St.
Camillus, N. Y. 13031

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Everett J. Rea
.....

Everett J. Rea

Sworn to before me this 23rd
day of July , 1975.

Russell D. Moloughney
Commissioner of Deeds

cc: James M. Sullivan, Jr., Esq.
Att: George H. Lowe, Esq.